United States Department of Labor
Employees' Compensation Appeals Board

W.W., Appellant	)	
and	)	**Docket No. 17-0360**
	)	**Issued: December 18, 2017**
U.S. POSTAL SERVICE, PHILADELPHIA PROCESSING & DISTRIBUTION CENTER, Philadelphia, PA, Employer	)	

Appearances:
Jeffrey P. Zeelander, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On January 2, 2017 appellant, through counsel, filed a timely appeal from two November 4, 2016 merit decisions of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUES

The issues are: (1) whether appellant met her burden of proof to establish a consequential emotional condition causally related to a February 13, 2013 employment injury; (2) whether OWCP properly terminated appellant's wage-loss compensation and medical benefits effective December 13, 2015; (3) whether appellant met her burden of proof to establish that she continued to be disabled after that date; (4) whether an overpayment of compensation in the amount of $2,661.52 was created; and, (5) whether OWCP properly found that appellant was at fault in the creation of the overpayment and, therefore, the overpayment was not subject to waiver of recovery of the overpayment.

On appeal counsel asserts that the opinions of Dr. Andrew J. Collier, a Board-certified orthopedic surgeon, and Dr. Eric Fine, a Board-certified psychiatrist, both OWCP referral physicians, were insufficient to carry the weight of the medical evidence. He also asserts that appellant was not at fault in creating the overpayment as it was sent to her by direct deposit.

FACTUAL HISTORY

On February 13, 2013 appellant, then a 59-year-old clerk-mail processor, filed a traumatic injury claim (Form CA-1) alleging that she was injured that day when the gate of an all-purpose container fell and hit her on the head. She stopped work on February 14, 2013 and did not return.

On February 13, 2013 Dr. Derek Isenberg, Board-certified in emergency medicine, saw appellant in an emergency room. Appellant noted being struck on her left temple at work. She also reported receiving outpatient treatment for depression. Appellant denied headache, pain, vomiting, or neurological complaints. Examination showed no abrasion, laceration, swelling, and no tenderness to palpation. Dr. Isenberg diagnosed head contusion. Appellant was discharged home, ambulating without assistance, to follow-up with her primary physician. Dr. Mark Nepp, an osteopath, also saw her on February 14, 2013. He noted the history of injury and appellant's current complaint of feeling lightheaded, dizzy, confused, and scared, and that she had headaches. Physical examination demonstrated abnormal finger-to-nose and heel-to-toe tests, and abnormal coordination. Dr. Nepp diagnosed head contusion and recommended a computerized tomography scan of the head.

Dr. Stephen F. Ficchi, an osteopath who practices pain medicine, began treating appellant on March 8, 2013. Appellant reported that, after the employment injury, she had left-sided headaches and had selective memory loss with difficulty in retrieving words. Dr. Ficchi diagnosed cervical strain and sprain, bilateral trapezius strain and sprain, postconcussion syndrome, post-traumatic cephalgia, and closed head injury. He recommended medication, physical therapy, and pain management, and advised that appellant was unable to work. Appellant began pain management with Dr. Ficchi. An April 4, 2013 cervical spine magnetic resonance imaging (MRI) scan demonstrated mild disc bulges versus mild disc herniations at C3-4, C4-5, and C5-6.

In March 13, 2013 correspondence, J. William Knox, Ph.D., a clinical psychologist, noted seeing appellant for a biofeedback evaluation that day. He reported that she injured her

neck and head at work on February 13, 2013 and since the injury had been experiencing pain in the bilateral trapezius and cervical regions and had daily headaches. Dr. Knox completed a physiological assessment and diagnosed cervical strain and sprain and post-traumatic cephalgia. He recommended biofeedback therapy for pain management. Appellant had her initial biofeedback session on March 14, 2013. She continued this treatment with Dr. Knox two or three times weekly thereafter.

On April 18, 2013 OWCP accepted the conditions of head contusion, postconcussion syndrome, bilateral trapezius sprain/strain, and cervical sprain/strain. She received continuation of pay from February 14 to March 30, 2013, and began receiving wage-loss compensation on March 31, 2013.

April 25, 2013 electrodiagnostic electromyograph (EMG) and nerve conduction velocity (NCV) studies of the upper extremities were compatible with acute irritation of the C6 nerve root on the left side and bilateral carpal tunnel syndrome. There was no evidence of ulnar entrapment neuropathy, thoracic outlet syndrome, or peripheral neuropathy present.

On May 16, 2013 Dr. Ficchi diagnosed cervical spine strain and sprain with dysfunction, protrusion/herniations at C3-4 and C5-6, acute left C6 radiculopathy, myofascial pain syndrome, post-traumatic headache syndrome, post-traumatic concussion syndrome, and post-traumatic stress disorder. Appellant continued pain management with Dr. Ficchi several times weekly. This consisted of percutaneous electrical neuromuscular stimulation, and injections to the occipital nerves, suprascapular region, trigger points, and joints.

Appellant was placed on the periodic compensation rolls in June 2013. On June 20, 2013 OWCP additionally accepted acute C6 radiculopathy, left, and cervical disc protrusion/herniation without myelopathy at C3-4 and C5-6.

Appellant also continued biofeedback with Dr. Knox. On November 7, 2013 Dr. Knox reported seeing her three times weekly, noting some slow progress in symptom reduction. He continued to submit biofeedback treatment reports.

In October 2013 OWCP referred appellant to Dr. Robert Allen Smith, a Board-certified orthopedic surgeon, for a second opinion regarding whether appellant had residuals of the accepted conditions. However, the statement of accepted facts (SOAF) sent to Dr. Smith did not include all accepted conditions.[3] In a November 8, 2013 report, Dr. Smith noted the history of injury and his review of the SOAF and medical record. Appellant complained of continuing headaches, dizziness, upper extremity numbness, trapezial pain, and problems with memory. Neck and trapezial muscle examination revealed no spasm, atrophy, trigger points, or deformity. Active spinal range of motion was satisfactory and functional with no spasm or rigidity. No abnormality was found on the scalp and head, and distal neurologic examination was normal, with no radicular arm problems. Dr. Smith indicated that the accepted conditions of head

[3] The SOAF furnished Dr. Smith included an April 23, 2013 statement that listed as accepted head contusion, postconcussion syndrome, bilateral trapezius sprain/strain, and cervical sprain/strain. An October 10, 2013 addendum was included. It did not list the additional conditions of acute C6 radiculopathy, left, and cervical disc protrusion/herniation without myelopathy at C3-4 and C5-6 accepted by OWCP on June 20, 2013.

contusion and trapezial and cervical sprain/strain had resolved without residuals. He found no evidence of C6 radiculopathy, noting that the cervical MRI scan showed degenerative changes, and that the EMG/NCV study findings were more likely due to degenerative disease rather than a post-traumatic residual, especially in light of appellant's initial emergency room evaluation. Dr. Smith commented that she did not need the electrical nerve stimulation and injections done by Dr. Ficchi. He indicated that appellant see a neurologist to determine if she had postconcussive syndrome. Dr. Smith concluded that, based on her benign examination, there was no identifiable organic pathology that would prevent her from returning to full-time regular duty, at least with regard to her musculoskeletal complaints.

OWCP asked Dr. Ficchi to comment on Dr. Smith's report. On December 11, 2013 Dr. Ficchi disagreed with Dr. Smith's conclusions. He opined that appellant had serious and permanent injuries from the February 13, 2013 work injury. Dr. Ficchi concluded that, within a reasonable medical certainty, her left C6 radiculopathy, and disc herniations at C3-4 and C5-6 were permanent and, since symptoms were not present before the work injury, he believed that appropriate palliative care was given to treat her symptoms. He continued to submit reports noting treatment, including injections, and advising that appellant remained totally disabled.

Dr. Knox also continued seeing appellant at least two times weekly. In reports dated January 6, March 31, and June 23, 2014, he reported that her condition had plateaued, opining that her condition was chronic.

In July 2014 OWCP referred appellant to Dr. Raoul Biniaurishvili, a Board-certified neurologist, for a second opinion evaluation.[4] In an August 14, 2014 report, Dr. Biniaurishvili described the employment injury and noted his review of medical evidence and diagnostic studies. He reported appellant's complaints of tension-type headaches and intermittent cervical pain, noting that she admitted having anxiety, difficulty falling asleep, and maintaining sleep. Neurological examination demonstrated 5/5 strength throughout, sensory intact to all primary modalities, deep tendon reflexes 2+ and symmetrical, and normal coordination tests. There was no pain on percussion of the cervical spine or tenderness on palpation of the trapezius muscle bilaterally. Spurling test was negative bilaterally, and examination of the thoracic and lumbar spines was normal. Dr. Biniaurishvili diagnosed status post head concussion, resolving; degenerative cervical spine disease with myofascitis of the cervical paraspinal musculature; no clinical evidence of cervical radiculopathy; and anxiety disorder. He commented that appellant had a head concussion at work and had preexisting anxiety disorder and depression, and that her tension-type headaches, which could be related to her emotional condition, were aggravated by postconcussion syndrome. Dr. Biniaurishvili advised that the cervical MRI scan showed degenerative changes, and an EMG/NCV study was necessary to assess evidence of cervical radiculopathy and, if negative, she could return to her regular job duties. He provided a work capacity evaluation (OWCP Form 5c) advising that appellant was not capable of performing her usual job, but could begin a six-hour workday, working up to eight hours over four to six weeks.

A September 11, 2014 upper extremity EMG/NCV study conducted by Dr. Biniaurishvili showed mild abnormalities on NCV study and a normal examination of all tested muscles on

[4] OWCP provided Dr. Biniaurishvili with a SOAF that included all accepted conditions.

needle EMG. He concluded that there was no significant electrophysiological evidence of a neuromuscular disease.

In a November 12, 2014 supplemental report, Dr. Biniaurishvili reiterated that, on his examination, there was no clinical evidence suggestive of cervical radiculopathy. He reiterated that the EMG/NCV study did not reveal evidence of cervical radiculopathy, and that the cervical MRI scan demonstrated age-related degenerative changes, but did not reveal any direct post-traumatic changes related to the employment injury. Dr. Biniaurishvili concluded that, within a reasonable degree of medical certainty, based on his review of the medical evidence, his neurological examination, and diagnostic tests, appellant had reached maximal medical improvement (MMI) and could return to full-time regular duty as a mail clerk processor. In an attached work capacity evaluation (OWCP-5c) he advised that she could work with no restrictions.

Dr. Ficchi continued to submit reports describing appellant's pain management with electrical stimulation and injections. He advised that she continued to be totally disabled. Dr. Knox also submitted monthly reports indicating that appellant's cervical condition was chronic due to bulging discs and left arm radiculopathy. He maintained that she realized consistent relief from their sessions. Dr. Knox's last biofeedback session with her was on September 18, 2014. In an undated report, received on October 6, 2014, he maintained that biofeedback treatment for appellant was palliative as she had consistent relief from the sessions.

On December 10, 2014 OWCP proposed to terminate appellant's wage-loss compensation and medical benefits based on the opinions of Dr. Smith, who advised that she had recovered from the accepted orthopedic conditions, and Dr. Biniaurishvili, who advised that she recovered from the accepted postconcussion syndrome and acute cervical radiculopathy.

In response, counsel maintained that Dr. Ficchi's opinion created a conflict in medical evidence, and that the opinion of appellant's psychologist supported that her preexisting condition had been aggravated by the work injury. He asked for a referee examination.

In a December 23, 2014 report, Dr. Ficchi indicated that on examination he found objective paraspinal muscle spasms, tenderness, and range of motion deficits associated with subjective complaints of pain. He described his treatment and noted that, on numerous occasions, appellant complained of daily chronic neck, upper back, and left suprascapular pain, bilateral upper extremity weakness and numbness, and additional complaints of headaches, cognitive delay, short-term memory loss, and left arm radicular symptoms. Dr. Ficchi noted the April 2013 MRI scan and her EMG/NCV study results. He disagreed with Dr. Smith and Dr. Biniaurishvili, maintaining that appellant had serious and permanent injuries from the February 13, 2013 work injury, should remain off work, and continue the medically necessary treatment. On a February 20, 2015 work capacity evaluation, Dr. Ficchi advised that she was totally disabled. He continued to submit reports describing appellant's pain management.

In a January 6, 2015 report, David A. Goodwin, Ph.D., an attending licensed clinical psychologist, noted that appellant was seen for outpatient psychotherapy every other week since February 2009 for treatment to cope with serious family-related issues. Dr. Goodwin reported that the February 2013 employment injury further exacerbated her difficulties and contributed to

increased fatigue, depression, and irritability, with reported concentration difficulties and issues managing multiple demands up to the present. He advised that, prior to the work injury, appellant was very fragile, due to the severity of her underlying condition, and that the contribution of the work injury was too much for her to handle. Dr. Goodwin concluded that it appeared reasonable to conclude that her work injury partially contributed to her inability to return to work.

In April 2015 OWCP found that a conflict in medical evidence was created between the opinions of OWCP referral physicians Drs. Smith and Biniaurishvili, and Dr. Ficchi, appellant's attending physician, regarding her degree of disability, work capacity, and the need for further treatment due to the February 2013 injury. It referred her to Dr. Andrew J. Collier, a Board-certified orthopedic surgeon, for a referee examination.

In a May 20, 2015 report, Dr. Collier noted the history of injury and appellant's complaints of occasional neck/cervical spine and bilateral trapezius pain with finger tingling. He described her medical treatment and his review of the SOAF and medical record.[5] Dr. Collier's physical examination revealed decreased neck and bilateral shoulder range of motion. Spurling's compression test for axial and radicular symptoms in all three positions, Tinel's at both elbows and wrists, and bilateral Phalen's tests were negative. Neurological examination was intact to sensory, motor, and deep tendon reflexes in both arms with no fasciculation's or atrophy present. Appellant complained of minor tenderness on examination at the base of the neck on the left. Carpal compression test showed minor tingling in the radial three digits on the right, negative on the left. Dr. Collier advised that, while the employment injury caused an acute cervical spine strain and aggravation of underlying degenerative disc disease, appellant had reached MMI and only had minimal occasional symptomatology. He found no evidence of an acute cervical herniated disc or C6 radiculopathy, noting a clean neurological examination and a clean recent EMG/NCV test. Dr. Collier diagnosed bilateral carpal tunnel syndrome and tendinitis or impingement syndrome of both shoulders, but opined that these conditions were not related to the February 2013 employment injury. He concluded that appellant did not need further treatment or care for her accepted cervical spine conditions. In an attached work capacity evaluation, Dr. Collier indicated that she was capable of returning to work up to a heavy physical capacity with a restriction of no static head and neck positions.

In June 2015 OWCP referred appellant to Dr. Eric W. Fine, a Board-certified psychiatrist, for a second opinion evaluation. In a September 10, 2015 report, Dr. Fine noted his review of the SOAF and the medical record. He recorded appellant's complaints of difficulty sleeping, frequent headaches, neck pain, lightheadedness, depression, and anxiety. Dr. Fine noted a past psychiatric history that appellant had been seen at the employing establishment employee assistance program for approximately 17 years related to anxiety and depression caused by a son's severe drug abuse disorder and associated dysfunctional behavior with physical trauma to family members and incarceration that continued to present and began many years prior to the February 13, 2013 work injury. He advised that this many years of stress was in no way related to the employment injury. Dr. Fine performed mental status examination and opined, within a reasonable degree of medical and psychiatric certainty, that appellant's

[5] OWCP provided Dr. Collier with a SOAF that included all accepted conditions.

psychiatric diagnosis was adjustment disorder with depression and anxiety, chronic, mild to moderate in severity, and was in no way associated with the February 2013 employment injury. He concluded that, from a psychiatric perspective only, she could return to full-time regular duty as a clerk-mail processor.

In November 2015 appellant submitted reports dated March 25, 2014, in which Dr. Brook Crichlow, a clinical psychologist, noted a history that she had been receiving counseling for the past seven years and had experienced depression for years with current anxiety while in public and some paranoia. Dr. Crichlow reported current medical complaints of headaches, lightheadedness, neck pain, and difficulties in sleeping, bending, reaching, and lifting. He performed mental status examination, noting paranoid thought patterns and anxious affect and mood. Attention, concentration, and recent and remote memory skills were mildly impaired due to cognitive limits. Cognitive functioning was below average, insight was poor, and judgment was fair. Dr. Crichlow diagnosed unspecified depressive disorder, unspecified anxiety disorder, and chronic pain. He recommended continued psychological and psychiatric treatment.

Appellant retired on disability, effective October 26, 2015. Social Security Administration (SSA) records indicate that she began receiving SSA retirement benefits in May 2014.

In a November 23, 2015 decision, OWCP terminated appellant's wage-loss compensation and medical benefits, effective December 13, 2015. It found that the weight of the medical evidence rested with Dr. Biniaurishvili, an OWCP referral physician, with regard to the accepted neurological conditions of postconcussion syndrome and acute cervical C6 radiculopathy, with Dr. Collier, who performed an impartial medical evaluation, with regard to the accepted orthopedic conditions, and with Dr. Fine, an OWCP referral physician, with regard to whether the February 13, 2013 employment injury caused a psychiatric condition.

Appellant, through counsel, timely requested a review of the written record by an OWCP hearing representative of the November 23, 2015 termination decision. Following the termination, Dr. Ficchi submitted form treatment notes and injection procedure notes dated from October 9 to December 8, 2015.

On January 26, 2016 OWCP made a preliminary determination that appellant received a $2,661.52 overpayment because she continued to receive wage-loss compensation through January 9, 2016 after such compensation had been terminated effective December 13, 2015. It found her at fault because she accepted a payment that she knew or reasonably should have known that she was not entitled to receive. Appellant was provided an overpayment action request and overpayment recovery questionnaire (OWCP-20). The record includes computer payment records and worksheets indicating that OWCP made one $2,661.52 net electronic deposit payment of wage-loss compensation for the period December 13, 2015 to January 9, 2016.

On January 27, 2016 counsel requested a hearing regarding the January 26, 2016 preliminary overpayment determination. Appellant submitted an overpayment questionnaire indicating that she had zero cash on hand, a zero checking account balance, a zero savings account balance, no stocks and bonds, and zero personal property. She listed monthly income of

$950.00, indicated that she was receiving zero SSA benefits,[6] and listed monthly expenses of $1,350.00. Appellant did not submit supplementary documentation.

On August 30, 2016 OWCP informed counsel that a scheduled September 7, 2016 hearing would cover both the termination and the overpayment issues. On September 2, 2016 counsel informed OWCP that he would like a review of the written record on both issues. In a September 6, 2016 letter, OWCP informed him that the record would be held open for 30 days for the submission of additional evidence. Nothing further was received.

On November 4, 2016 an OWCP hearing representative affirmed the November 23, 2015 decision. She found that Dr. Fine's opinion established that appellant's emotional condition was not caused or aggravated by the February 13, 2013 work injury. The hearing representative determined that a conflict in medical evidence was not created because Dr. Ficchi, a general practitioner, was not a specialist in an appropriate field and sufficient to create a conflict. She also found deficiencies in Dr. Smith's second opinion evaluation because he did not reference the SOAF. The hearing representative found that Dr. Collier served as an OWCP referral physician and not a referee physician. She credited his opinion and that of Dr. Biniaurishvili, finding them rationalized and sufficient to terminate appellant's wage-loss and medical benefits.

In a second November 4, 2016 decision, OWCP's hearing representative finalized the January 26, 2016 preliminary overpayment determination. She found that appellant continued to receive wage-loss compensation, after her monetary benefits had been terminated effective December 13, 2015, through January 9, 2016. This created a $2,661.62 overpayment of compensation. The hearing representative further found appellant at fault in creating the overpayment and thus not entitled to waiver of recovery of the overpayment. As the overpayment questionnaire she submitted had not been properly completed, the overpayment was to be recovered in full.

LEGAL PRECEDENT -- ISSUE 1

In discussing the range of compensable consequences, once the primary injury is causally connected with the employment, Larson notes that, when the question is whether compensability should be extended to a subsequent injury or aggravation related in some way to the primary injury, the rules that come into play are essentially based upon the concepts of direct and natural results and of the claimant's own conduct as an independent intervening cause. The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.[7]

An employee has the burden of proof to establish that any specific condition for which compensation is claimed is causally related to the employment injury.[8] Causal relationship is a

[6] On December 1, 2015 OWCP wrote SSA for information regarding appellant's SSA rate with and without contribution of Federal retirement contribution. On February 22, 2016 SSA informed OWCP that from August 2013 to present she was entitled to disability benefits.

[7] Lex K. Larson, *The Law of Workers' Compensation* § 3.05 (2014); *see Charles W. Downey*, 54 ECAB 421 (2003).

[8] *Kenneth R. Love*, 50 ECAB 276 (1999).

medical issue, and the medical evidence required to establish a causal relationship is rationalized medical evidence.[9] The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty, and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the employee.[10] Neither the mere fact that a disease or condition manifests itself during a period of employment nor the belief that the disease or condition was caused or aggravated by employment factors or incidents is sufficient to establish causal relationship.[11]

A claimant bears the burden of proof to establish a claim for a consequential injury. As part of this burden, he or she must present rationalized medical opinion evidence, based on a complete factual and medical background, showing causal relationship. The opinion must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.[12]

ANALYSIS -- ISSUE 1

The Board finds that appellant did not meet her burden of proof to establish that her diagnosed emotional condition was caused or aggravated by, or was a consequence of the accepted February 13, 2013 employment injury. OWCP accepted head contusion, postconcussion syndrome, bilateral trapezius sprain/strain, cervical sprain/strain, acute cervical (C6) radiculopathy, and cervical disc protrusion/herniation without myelopathy, C3-4 and C5-6.

The opinion of a physician supporting causal relationship must be based on a complete factual and medical background, supported by affirmative evidence, must address the specific factual and medical evidence of record, and must provide medical rationale explaining the nature of the relationship between the diagnosed condition and the established incident or factor of employment.[13] No physician did so in this case.

The medical evidence relevant to the claimed emotional condition includes reports from Dr. Knox, a clinical psychologist, who performed biofeedback to relieve cervical and trapezial pain and headaches, two to three times weekly, beginning in March 2013, continuing until September 18, 2014. Dr. Knox, however, did not diagnose an emotional condition *per se*. His opinion is, therefore, insufficient to meet appellant's burden of proof.[14]

[9] *Jacqueline M. Nixon-Steward*, 52 ECAB 140 (2000).

[10] *Leslie C. Moore*, 52 ECAB 132 (2000); *Gary L. Fowler*, 45 ECAB 365 (1994).

[11] *Dennis M. Mascarenas*, 49 ECAB 215 (1997).

[12] *Charles W. Downey*, *supra* note 7.

[13] *Robert Broome*, 55 ECAB 339 (2004).

[14] *Willie M. Miller*, 53 ECAB 697 (2002).

Likewise, the opinion Dr. Crichlow, a clinical psychologist, is insufficient. He reported on March 25, 2014 that appellant had experienced depression for years and current anxiety while in public and some paranoia, and diagnosed unspecified depressive disorder, unspecified anxiety disorder, and chronic pain and recommended continued psychological and psychiatric treatment. Dr. Crichlow, however, did not reference the February 13, 2013 work injury or discuss any cause of her diagnosed anxiety and depression. The Board has long held that medical evidence that does not offer any opinion regarding the cause of an employee's condition is of limited probative value on the issue of causal relationship.[15]

Dr. Goodwin, a clinical psychologist, provided a January 6, 2015 report. He noted that appellant was seen for outpatient psychotherapy since February 2009 to cope with serious family-related issues. Dr. Goodwin opined that the February 2013 injury exacerbated her "difficulties" and contributed to increased fatigue, depression, and irritability, with reported concentration problems and managing multiple demands. He noted that, before the work injury, appellant was very fragile due to the severity of her underlying condition, and that the contribution of the work injury was too much for her to handle. Dr. Goodwin found that it appeared reasonable to conclude that her work injury partially contributed to her inability to return to work. While the opinion of a physician supporting causal relationship does not have to reduce the cause or etiology of a disease or condition to an absolute certainty, the opinion must be one of reasonable medical certainty and not speculative or equivocal in character. A medical opinion not fortified by medical rationale is of diminished probative value.[16] Dr. Goodwin couched his opinion in equivocal terms and his report contains insufficient rationale explaining how the February 13, 2013 work injury caused or aggravated the diagnosed emotional conditions. His report is, therefore, of insufficient rationale to meet appellant's burden of proof.[17]

In a well-rationalized report dated September 10, 2015, Dr. Fine, OWCP's referral psychiatrist who reviewed the SOAF and medical record, noted that appellant had a 17-year history of anxiety and depression caused by severe dysfunctional behavior of a son with physical trauma to family members that continued to present and began many years before the February 13, 2013 work injury. He examined her and diagnosed adjustment disorder with depression and anxiety, chronic, mild to moderate in severity. Dr. Fine opined that appellant's psychiatric diagnoses were in no way associated with the February 2013 employment injury. He concluded that, from a psychiatric perspective only, she could return to full-time regular duty as a clerk-mail processor.

Contrary to counsel's assertion on appeal, Dr. Fine's report is of sufficient rationale to support that appellant's diagnosed emotional condition was not caused or aggravated by, or a consequence of the accepted February 13, 2013 employment injury. Moreover, appellant submitted insufficient evidence to support a work-related emotional condition diagnosis. The opinion supporting causal relationship must be one of reasonable medical certainty and must be

[15] *Id.*

[16] *W.W.*, Docket No. 09-1619 (issued June 2, 2010).

[17] *Supra* note 13.

supported by medical rationale explaining the nature of the relationship of the diagnosed condition and the specific employment factors or employment injury.[18] A well-rationalized opinion is particularly warranted in this case due to appellant's history of preexisting emotional conditions.[19] The Board finds that appellant has not met her burden of proof to establish a causal relationship between the claimed emotional conditions and the February 13, 2013 work injury.

LEGAL PRECEDENT -- ISSUE 2

Once OWCP accepts a claim and pays compensation, it has the burden of proof to justifying modification or termination of an employee's benefits. It may not terminate compensation without establishing that the disability ceased or that it was no longer related to the employment.[20] OWCP's burden of proof in terminating compensation includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.[21]

ANALYSIS -- ISSUE 2

OWCP accepted the conditions of displacement of head contusion, postconcussion syndrome, bilateral trapezius sprain/strain, cervical sprain/strain, acute cervical (C6) radiculopathy, and cervical disc protrusion/herniation without myelopathy, C3-4 and C5-6, caused by a February 13, 2013 employment injury. Appellant stopped work on February 14, 2013 and did not return. She received continuation of pay and wage-loss compensation, and was placed on the periodic compensation rolls in June 2013.

By decision dated November 23, 2015, OWCP terminated appellant's wage-loss compensation and medical benefits, effective December 13, 2015. It found the weight of the medical evidence rested with Dr. Biniaurishvili, an OWCP referral Board-certified neurologist, with regard to the accepted neurological conditions of postconcussion syndrome and acute cervical C6 radiculopathy, and with Dr. Collier, a Board-certified orthopedic surgeon who performed an impartial medical evaluation, with regard to the accepted orthopedic conditions.

With regard to the accepted orthopedic conditions, OWCP determined that a conflict in medical evidence had been created between Dr. Ficchi, an attending osteopath, and Dr. Smith, who provided a second opinion evaluation for OWCP and referred appellant to Dr. Collier for an impartial evaluation. The Board, however, finds that, because the SOAF sent to Dr. Smith failed to include the additional conditions that were accepted by OWCP on June 20, 2013,[22] his opinion is insufficient to establish a conflict in medical evidence. It is OWCP's responsibility to provide

[18] *C.O.*, Docket No. 10-0189 (issued July 15, 2010).

[19] *K.P.*, Docket No. 14-1330 (issued October 17, 2014).

[20] *Jaja K. Asaramo*, 55 ECAB 200 (2004).

[21] *Id.*

[22] *Supra* note 3.

a complete and proper frame of reference for a physician by preparing a SOAF.[23] Because the SOAF sent to Dr. Smith was inaccurate, his report is of diminished probative value on the issue of whether appellant's accepted orthopedic conditions had resolved.[24] Thus, Dr. Collier, who was forwarded a proper SOAF, would not be entitled to special weight as an impartial specialist.[25]

Nonetheless, the Board finds that Dr. Collier's opinion as an OWCP referral physician is of sufficient rationale to establish that appellant's orthopedic conditions had resolved. In his May 20, 2015 report, Dr. Collier noted the history of injury and her current complaints. He described appellant's medical treatment and his review of the SOAF and medical record and provided comprehensive examination findings. As noted, the only positive finding was her complaint of minor tenderness on examination at the base of the neck on the left, and that a carpal compression test demonstrated minor tingling in the radial three digits on the right. Dr. Collier advised that, while the employment injury caused an acute cervical spine strain and aggravation of underlying degenerative disc disease, appellant had reached MMI and only had minimal occasional symptomatology. He found no evidence of an acute cervical herniated disc or C6 radiculopathy, noting a clean neurological examination and a clean recent EMG/NCV test. Dr. Collier diagnosed bilateral carpal tunnel syndrome and tendinitis or impingement syndrome of both shoulders, but opined that these were not related to the February 2013 work injury. He concluded that appellant did not need further treatment or care for her accepted cervical spine conditions. Dr. Collier provided an attached work capacity evaluation indicating that she could return to work up to a heavy physical capacity with a restriction of no static head and neck positions.

With regard to the accepted head contusion and postconcussion syndrome, Dr. Biniaurishvili was the only neurologist who examined appellant. He was provided a complete SOAF. In August 14 and November 12, 2014 reports, Dr. Biniaurishvili described the work injury, noted his review of medical evidence, and reported appellant's complaints. Neurological examination was negative. The only positive physical finding was tenderness on palpation of the trapezius muscle bilaterally. Dr. Biniaurishvili diagnosed status post head concussion, resolving; degenerative cervical spine disease with myofascitis of the cervical paraspinal musculature; no clinical evidence of cervical radiculopathy; and anxiety disorder. He advised that, on his examination, there was no clinical evidence suggestive of cervical radiculopathy. Dr. Biniaurishvili indicated that a September 11, 2014 EMG/NCV study did not reveal any electrophysiological evidence of cervical radiculopathy, and that the cervical MRI scan demonstrated age-related degenerative changes and did not reveal any direct post-traumatic changes due to the work injury. He concluded that, based on his review of the medical evidence, his neurological examination, and diagnostic tests, appellant had reached MMI and could return

[23] *Donald E. Ewals*, 51 ECAB 428 (2000).

[24] *See S.H.*, Docket No. 14-1280 (issued June 24, 2015).

[25] *See Manuel Gill*, 52 ECAB 282 (2001) (in situations where there are opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based on a proper factual background, must be given special weight).

to full-time regular duty as a mail clerk processor. In an attached work capacity evaluation Dr. Biniaurishvili advised that she could work with no restrictions.

Appellant's attending osteopath, Dr. Ficchi, indicated on December 23, 2014 that on examination he found paraspinal muscle spasms, tenderness, and range of motion deficits associated with her subjective complaints of pain. He described his treatment and noted that on numerous occasions appellant complained of daily chronic neck, upper back, and left suprascapular pain, bilateral arm weakness and numbness in addition to headaches, cognitive delay, short-term memory loss, and left arm radicular symptoms. Dr. Ficchi noted the April 2013 MRI scan and EMG/NCV study results. He disagreed with the conclusions of Dr. Smith, maintaining that appellant suffered serious and permanent injuries due to the February 13, 2013 employment injury, and should remain off work and continue the medically necessary treatment she had been receiving. On a February 20, 2015 work capacity evaluation, Dr. Ficchi advised that she was totally disabled. He also submitted numerous weekly form reports and procedure notes chronicling appellant's treatment up to November 3, 2015. On November 3, 2015 Dr. Ficchi indicated that she reported daily chronic neck, trapezial, shoulder, suboccipital, and suprascapular pain, and headaches. He circled "disabled," on the form report, and performed a suprascapular nerve block, occipital nerve, and trigger point injections.

The Board finds Dr. Ficchi's opinion is insufficient to establish a conflict in medical evidence with the well-rationalized opinions of Dr. Collier and Dr. Biniaurishvili whose opinions represented the weight of the medical evidence regarding the accepted orthopedic and neurologic conditions at the time OWCP terminated benefits on December 13, 2015. Each physician had full knowledge of the relevant facts and evaluated the course of appellant's accepted orthopedic conditions. Their opinions were based on proper factual and medical history and their reports contained a detailed summary of this history. Each addressed the medical records to make his own examination findings to reach a reasoned conclusion regarding appellant's accepted conditions.[26] At the time benefits were terminated, neither Dr. Biniaurishvili nor Dr. Collier found a basis on which to attribute any residuals or continued disability to these conditions. Their opinions are found to be probative evidence and reliable, and sufficient to justify OWCP's termination of benefits for the accepted orthopedic and neurologic conditions.[27]

OWCP, therefore, met its burden of proof to terminate appellant's wage-loss compensation and medical benefits on December 13, 2015.[28]

LEGAL PRECEDENT -- ISSUE 3

As OWCP met its burden of proof to terminate appellant's wage-loss compensation on December 13, 2015, the burden shifted to her to establish that she had any disability causally

[26] *See Michael S. Mina*, 57 ECAB 379 (2006) (the opportunity for and thoroughness of examination, the accuracy and completeness of the physician's knowledge of the facts and medical history, the care of analysis manifested, and the medical rationale expressed in support of the physician's opinion are facts, which determine the weight to be given to each individual report).

[27] *M.A.*, Docket No. 16-1687 (issued January 26, 2017).

[28] *Supra* note 20.

related to the accepted right shoulder strain.[29] Causal relationship is a medical issue. The opinion of the physician must be based on a complete factual and medical background of the claimant, must be one of reasonable medical certainty and must be supported by medical rationale explaining the nature of the relationship between the diagnosed condition and the specific employment factors identified by the claimant.[30]

ANALYSIS -- ISSUE 3

The Board finds that appellant failed to establish that she had continuing residuals or disability relating to the accepted conditions after December 13, 2015.

Subsequent to the December 13, 2015 termination appellant submitted a number of form reports and procedure notes from Dr. Ficchi dated October 9 to December 8, 2015. As these predated the termination of wage-loss compensation and medical benefits on December 13, 2015, they are of limited probative value regarding a period of disability thereafter.[31] Thus, there is no medical evidence of record of sufficient rationale to establish that appellant had continuing disability or residuals after December 13, 2015 due to the accepted conditions caused by a February 13, 2013 employment injury. She, therefore, did not meet her burden of proof.[32]

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607, with regard to the issues of whether she met her burden of proof to establish a consequential emotional condition caused by a February 13, 2013 employment injury and whether she met her burden of proof to establish that she continued to be disabled after December 13, 2015, the date OWCP terminated her wage-loss compensation and medical benefits.

LEGAL PRECEDENT -- ISSUE 4

Section 8102 of FECA provides that the United States shall pay compensation for the disability or death of an employee resulting from personal injury sustained while in the performance of duty.[33] Section 8129(a) provides that, when an overpayment has been made to an individual because of an error of fact or law, adjustment shall be made under regulations prescribed by OWCP, by decreasing later payments to which the individual is entitled.[34]

[29] *See Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003).

[30] *Supra* note 10.

[31] *D.M.*, Docket No. 16-1893 (issued March 21, 2017).

[32] *Supra* note 29.

[33] 5 U.S.C. § 8102.

[34] *Id*. at § 8129(a).

ANALYSIS -- ISSUE 4

The Board finds that OWCP properly found that appellant received an overpayment of compensation in the amount of $2,661.52. In a November 23, 2015 decision, OWCP terminated her medical and compensation benefits as she had no injury-related residuals or continuing disability as a result of the accepted February 13, 2013 employment injury. The record reveals, however, that OWCP electronically deposited one additional periodic payment on January 6, 2016, for the period December 13, 2015 through January 9, 2016. Appellant was not entitled to receive disability compensation between November 23, 2015 and January 9, 2016, and the entire amount of net compensation she received during that period, $2,661.52, represented an overpayment of compensation. For these reasons, OWCP properly determined that she received an overpayment of compensation totaling $2,661.52.[35]

LEGAL PRECEDENT -- ISSUE 5

Section 8129 of FECA provides that an overpayment in compensation shall be recovered by OWCP unless "incorrect payment has been made to an individual who is without fault and when adjustment or recovery would defeat the purpose of FECA or would be against equity and good conscience."[36]

Section 10.433(a) of OWCP regulations provides that OWCP:

> "[M]ay consider waiving an overpayment only if the individual to whom it was made was not at fault in accepting or creating the overpayment. Each recipient of compensation benefits is responsible for taking all reasonable measures to ensure that payments he or she receives from OWCP are proper. The recipient must show good faith and exercise a high degree of care in reporting events which may affect entitlement to or the amount of benefits…. A recipient who has done any of the following will be found to be at fault in creating an overpayment --
>
> > (1) Made an incorrect statement as to a material fact which he or she knew or should have known to be incorrect; or
> >
> > (2) Failed to provide information which he or she knew or should have known to be material; or
> >
> > (3) Accepted a payment which he or she knew or should have known to be incorrect. (This provision applies only to the overpaid individual)."[37]

To determine if an individual was at fault with respect to the creation of an overpayment, OWCP examines the circumstances surrounding the overpayment. The degree of care expected

[35] *T.M.*, Docket No. 15-0147 (issued November 13, 2015).

[36] 5 U.S.C. § 8129; *see Linda E. Padilla*, 45 ECAB 768 (1994).

[37] 20 C.F.R. § 10.433(a); *see Sinclair L. Taylor*, 52 ECAB 227 (2001); *see also* 20 C.F.R. § 10.430.

may vary with the complexity of those circumstances and the individual's capacity to realize that he or she is being overpaid.[38]

ANALYSIS -- ISSUE 5

OWCP determined that appellant was at fault in creating the overpayment under the third standard because she accepted a payment she knew or should have known was incorrect. Although it erroneously issued wage-loss compensation for total disability for the period at issue, she was not entitled to this disability compensation because her benefits had been terminated effective December 13, 2015.

With respect to whether an individual is with fault, section 10.433(b) of OWCP regulations provides that whether or not OWCP determines that individual was without fault with respect to the creation of the overpayment depends on the circumstances surrounding the overpayment. The degree of care expected may vary with the complexity of the circumstances and the individual's capacity to realize that he or she is being overpaid. The Board has also noted that, in applying the tests to determine fault, OWCP should apply a reasonable person test.[39]

A complete analysis of the fault issue when a claimant's wage-loss compensation has been terminated and continues to receive compensation must properly consider the first payment after a return to work. In this case, after the termination of monetary compensation on December 13, 2015, appellant received an electronic deposit of $2,661.52 on January 6, 2016. The question is, whether she had, at the time of this deposit, accepted a payment she knew or should have known was incorrect. While the hearing representative indicated that appellant's direct deposit was accompanied by a benefit statement, such statement is not found in the case record. It is, therefore, unclear if and when this statement was sent and received. Thus, there is no evidence to establish that, at the time appellant received the January 6, 2016 deposit, she knew or should have known this payment was incorrect.

For these reasons, the Board finds that appellant was not at fault in the creation of the overpayment of compensation of $2,661.52 because it was based on one direct deposit made on January 6, 2016.[40] The case must therefore be remanded for OWCP to consider whether she is entitled to waiver of recovery of the overpayment.

CONCLUSION

The Board finds that appellant did not establish a consequential emotional condition caused by a February 13, 2013 employment injury, that OWCP properly terminated her wage-loss compensation and medical benefits effective December 13, 2015, and that she did not

[38] *Id*. at § 10.433(b); *Neill D. Dewald*, 57 ECAB 451 (2006).

[39] *C.D*., Docket No. 12-1913 (issued august 2, 2013).

[40] *See T.B.*, Docket No. 16-1807 (issued February 22, 2017); *see also Tammy Craven*, 57 ECAB 689 (2006) (an employee who receives payments from OWCP *via* direct deposit may not be at fault the first time incorrect funds are deposited into her account, as the acceptance of the resulting overpayment lacks the requisite knowledge).

establish that she continued to be disabled after that date. The Board further finds that an overpayment of compensation in the amount of $2,661.52 was created, and that she was not at fault in the creation of the overpayment which was based on one direct deposit payment.

ORDER

IT IS HEREBY ORDERED THAT the November 4, 2016 decision of the Office of Workers' Compensation Programs on the issues of termination, continuing disability, and causal relationship of a consequential emotional condition is affirmed. The November 4, 2016 decision regarding an overpayment of compensation is affirmed in part and set aside in part, and the case is remanded to OWCP for proceedings consistent with this opinion of the Board.

Issued: December 18, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board